No. (1)

Supreme Court, U.S.
FILED
081584 JUN 22 2009

In The Supreme Court of the United States

VALUEPEST.COM OF CHARLOTTE, INCORPORATED, formerly known as Budget Pest Prevention, Incorporated; NATIONAL PEST CONTROL, INCORPORATED; PEST PROS, INCORPORATED, individually and on behalf of persons similarly situated,

Petitioners,

v.

BAYER CORPORATION; BAYER CROPSCIENCE LP; BASF CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

David Barry
Counsel of Record
Barry & Associates
Pier 9, Suite 112
San Francisco, CA 94111
(415) 398-6600

David D. Bland
Weaver, Bennett & Bland, PA
Post Office Box 2570
Matthews, NC 28106
(704) 844-1400

Forrest A. Ferrell
Warren A. Hutton
Sigmon, Clark, Mackie,
Hutton, Hanvey & Ferrell, PA
Post Office Drawer 1470
Hickory, NC 28603
(828) 328-2596

Attorneys for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Where resale price agreements through retailer agents raise consumer prices, which controls Sherman Act § 1 liability, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) or *United States v. General Electric Co.*, 272 U.S. 476 (1926)?

2. Did petitioners establish as a matter of law that respondents' resale price agreements with retailers violated §1 of the Sherman Act under *Leegin*?

PARTIES TO THE PROCEEDING

The petitioners are ValuePest.com of Charlotte, Incorporated, National Pest Control, Incorporated, and Pest Pros, Incorporated, individually and on behalf of persons similarly situated.

The respondents are Bayer Corporation, BayerCropscience, LP, and BASF Corporation. Bayer Corporation and BayerCropscience, LP will be collectively referred to as "Bayer" below.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
1. THE FOURTH CIRCUIT DID NOT FOLLOW SUPREME COURT LAW	7
2. CERTIORARI IS REQIRED TO ASSURE UNIFORMITY BETWEEN THE CIRCUITS	12
CONCLUSION	14

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED MARCH 24, 2009	App. 1
MEMORANDUM AND ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION, DATED JULY 13, 2007	App. 26
JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION, DATED JULY 13, 2007	App. 52

TABLE OF AUTHORITIES

Cases

Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1992)	11
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911)	8
Hardwick v. Nu-Way Oil Co., 589 F.2d 806, 809 (5th Cir. 1979)	9
Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007)	*passim*
Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266, 269 (4th Cir. 1979)	10
Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 (7th Cir. 1986)	6,9
Oksanen v. Page Memorial Hosp., 945 F.2d 696, 709 (4th Cir. 1991)	11
Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1223 (8th Cir. 1987)	10
Simpson v. Union Oil Co. of California, 377 U.S. 13 (1963)	8
Toledo Mack Sales v. Mack Trucks, 530 F.3d 204,224 (3rd Cir. 2008)	12
United States v. General Electric Co., 272 U.S. 476 (1926)	i, 6,8,9

Statutes

15 U.S.C. § 1	2, 4
15 U.S.C. § 26	1
28 U.S.C. § 1331	1
28 U.S.C. § 1337	1

Rules

F.R.App.P. Rule 4(a)(1)(A). 1
Sup. Ct. R. 13.1 1

WRIT OF CERTIORARI

Petitioners ValuePest.com of Charlotte, Incorporated, National Pest Control, Incorporated, and Pest Pros, Incorporated respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The reported decision of the Court of Appeals for the Fourth Circuit is attached in the Appendix at App. 1. The district court memorandum decision is attached at App. 26, along with its judgment at App. 52.

JURISDICTION

The district court exercised jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337, and 15 U.S.C. § 26. The district court filed its judgment on July 13, 2007. Petitioners timely filed a notice of appeal on August 6, 2007. F.R.App.P. Rule 4(a)(1)(A).

The court of appeals filed its judgment March 24, 2009, and petitioners timely file this petition for writ of certiorari. Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' claims arise under §1 of the Sherman Act, 15 U.S.C. §1, which provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal."

STATEMENT OF THE CASE

In 1996 Bayer introduced a new termite-killing agent with the beneficial property that it did not repel termites. Earlier termiticides worked by repelling termites. Bayer's new product, called Premise, was an advance because termites walked on it, carrying doses of it into their colonies, where it wiped out large numbers of termites. Premise was popular and its use steadily grew.

Bayer sold Premise to approximately 30 chemical distributors, who resold it to over ten thousand pest firms such as petitioners, who are hired by consumers to mitigate and prevent termite infestation of their homes and other buildings.

In 2000 Aventis CropScience began selling a rival non-repellent termiticide called Termidor. Aventis initially sold to a select group of pest control operators.

After several months, Aventis changed and expanded its sales program to sell through the same chemical distributors that sold Premise. The new sales contracts set the price at which the distributors would sell to pest control operators. Such contracts were denominated "agency" contracts and purported to make the distributors agents of Aventis. The risks of loss and expenses of sale were allocated between Aventis and the distributors. The contracts also purported to leave title in the Termidor products in Aventis till delivered to the ultimate buyers, the pest firms. On each sale, the spread between what the pest firms paid and what the distributors remitted to Aventis was denominated a "commission."

Distributors immediately noticed the price spread imposed by Aventis was higher than the spread they earned on their sales of Bayer's Premise. Several expressed their unhappiness to Bayer. On Jan. 1, 2007, within three months of the start of the Aventis agency program, Bayer imposed a similar agency program, setting the prices to be paid by pest firms and raising their profit margins through agency "commissions." In 2001, Premise sales in the United States exceeded $38 million.

In October of 2001 the boards of directors of Bayer and Aventis agreed Bayer would purchase all the shares of Aventis. After investigation, the Federal Trade Commission approved the

acquisition on condition that Bayer hold separate and divest the Termidor assets. Bayer did so, the merger completed, and BASF purchased the Termidor assets on March 21, 2003. Since then BASF has manufactured and sold Termidor in the United States. BASF became the assignee of the earlier agency contracts for Termidor.

On April 25, 2005, Valuepest filed this action in the United States District Court for the Western District of North Carolina, alleging vertical price fixing by respondents under § 1 of the Sherman Act, 15 U.S.C. § 1. Bayer ended its agency sales methods within months of the filing of the suit. BASF continued selling Termidor using agency agreements setting consumer prices.

By stipulation, the parties focused initially on respondents' sales through the largest retailer, Univar, with 35% to 40% of U.S. retail sales to pest firms.

In cross-motions for summary judgment on the issue of liability, petitioners established:

1. Bayer and BASF together held 100% market share of the manufacturing layer of the liquid non-repellent termiticide market.

2. Univar and the rest of the 30 retailers held 100% market share of the retail layer of the liquid non-repellent termiticide market.

3. Respondents made all their purchases of Premise and Termidor at the prices fixed in the agency contracts of respondents, since 100% of the consumer channel for pest firms was controlled by respondents, through their control of all retailers.

4. Respondents' price-control program raised profit margins above earlier competitive margins by $40 to $45 million in the relevant agency period, increasing prices paid by respondents and similar pest firms by $40-45 million over prices that would have prevailed had respondents let Univar and other retailers set prices competitively.

5. The millions of dollars of consumer overcharges did not enable even one procompetitive activity. Respondents did not show price increases to consumers stimulated: interbrand competition; or retailer investment in services or promotion; or broader consumer choices; or retailer services that could not exist with the potential of free-riding; or market entry of new firms or brands; or any impact other than price increases to consumers.

The district court entered summary judgment in favor of respondents, App. 52, defining the question thus:

> The "key" question to be addressed

> is "whether the agency relationship has a function other than to circumvent the rule against price fixing." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436 (7th Cir. 1986). [App. 37.]

The Fourth Circuit affirmed in a published opinion, __ F.4th ___ (4th Cir. 2009), App.1.

The Fourth Circuit held *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) did not apply because *Leegin* did not explicitly overrule *United States v. General Electric Co.*, 272 U.S. 476 (1926), and therefore *General Electric* controlled. Under *General Electric*, since respondents had not shifted all of the business risk to the retailers, the agreements were not a sham. As such, the agency agreements lacked the "combination or conspiracy" element required of § 1 claims under the Sherman Act, and petitioners' claims failed.

The Fourth Circuit held:

> Quite simply, *Leegin* has no bearing on the continued vitality of *General Electric*, and plaintiffs' argument to the contrary cannot stand. The two holdings stand independently of each other. *General Electric* holds that a principal-agent relationship is not an agreement for antitrust purposes, while *Leegin* only addressed

> the circumstances under which an agreement proven to exist is reasonable under § 1. *Leegin* thus is only relevant if plaintiffs can prove the agency relationships claimed by defendants were a sham.
>
> App. 12.

REASONS FOR GRANTING THE PETITION

1. The Fourth Circuit failed to follow Supreme Court law.

Leegin required petitioners to show record evidence that respondents had market power, and that respondents entered into price agreements with their agent retailers which raised the price of termiticides above what would have obtained without the vertical price restraints. Petitioners showed all these elements. *Leegin* then shifts the burden to respondents to show record evidence of pro-competitive activities that were made possible through their price-raising activities. Respondents did not do so. Upon that record, the Fourth Circuit was required under *Leegin* to reverse the district court's judgment, directing summary judgment of liability in favor of petitioners and remanding.

The Fourth Circuit failed to apply Supreme Court law in several respects.

First, although this case obviously involves vertical price restraints, the Fourth Circuit did not apply *Leegin*. In the opening paragraph of *Leegin* this Court stated, "We now hold that *Dr. Miles* [*Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911)] should be overruled and that vertical price restraints are to be judged by the rule of reason." 551 U.S. 877.

Instead of applying the rule of reason under *Leegin* to this vertical price restraint case, the Fourth Circuit applied *General Electric*.

The Fourth Circuit failed to recognize that *Leegin* addressed the problems raised by a century of vertical restraint cases, including such leading cases as *Dr. Miles*, *General Electric*, and *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1963). All these and more like them involved written sales agreements between manufacturers and retail dealers in which the manufacturer retained title to the goods sold as part of a plan to control the retail prices at which the goods were sold. All involved manufacturers with extensive networks of retailer agents.

Leegin by its terms is to be applied to *all* vertical price restraint cases, including those involving sales agents.

The second error of the Fourth Circuit was in creating an antitrust immunity based on its reading of *General Electric*. The Fourth Circuit observed that many business sectors traditionally used agents. The Fourth Circuit reasoned:

> However, "courts generally have not interpreted *Simpson* as a blanket condemnation of all consignment agreements in which the manufacturer/supplier sets retail prices." *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809 (5th Cir. 1979). Nor should they have. It cannot "seriously be argued that the ancient and ubiquitous practice of principals' telling their agents what price to charge the consumer is just some massive evasion of the rule against price fixing." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986). Otherwise, perverse results would obtain—such as a homeowner being guilty of violating § 1 "when he tells his broker at what price to sell his home." *Id.* at 1436. [App. 15]

The general statement is correct -- antitrust law does not make a blanket condemnation of consignment agreements by which the manufacturer sets the prices. *Leegin* establishes this rule. But the Fourth Circuit did not follow

Leegin; it instead cited and applied older rules now replaced by the rule of reason applied by *Leegin*. The Fourth Circuit reasoned thus:

> Courts must look "to the substance of the parties' dealings rather than merely to form." *Marty's Floor Covering Co. v. GAF Corp.*, 604 F.2d 266, 269 (4th Cir. 1979). In this inquiry, courts have considered most important how business risks were allocated between the parties. "If a distributor deals with his supplier as an 'independent businessman' who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risks of transactions with the customers . . . it is likely that the distributor is merely an agent for the manufacturer." *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1223 (8th Cir. 1987). [App. 16]

This "risk allocation" method is completely different than the rule of reason required by *Leegin*.

The rule of reason requires a plaintiff to show restraint in the relevant market (often shown by price increases), followed by defendant being permitted to show offsetting benefits, followed by plaintiff's being permitted to show the benefits could have been achieved by a less-restrictive alternative. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1992).

The Fourth Circuit applied the wrong test. Its opinion stated the only way for petitioners to recover would be for them to prove the contracts with the sales agents were a sham, meaning they served no purpose other than to disguise a purpose to raise prices. "*Leegin* thus is only relevant if plaintiffs can prove the agency relationships claimed by defendants were a sham." App. 12.

The Fourth Circuit's interpretation of *Leegin* is a complete rejection of the rule of reason. The chief vice of the Fourth Circuit *Leegin* interpretation is that even the *slightest non-sham effect* of a vertical price restraint justifies *the most egregious consumer overcharges.*

The harmful effects of this approach are vividly presented here. Plaintiffs proved vertical price setting by respondents produced consumer overcharges of $40-45 million as compared to the preceding competitive period. The Fourth Circuit held these overcharges were lawful because:

> When Termidor in Univar's possession was stolen on two occasions, BASF, not Univar, wrote off the losses. When Univar suffered a credit loss on a sale of Premise, Bayer reimbursed Univar. [App. 19]

The cited losses were not quantified; nor were they shown to be beneficial to competition in any way; nor was there a showing by respondents that the allocation of such losses could only be achieved by fixing retail prices. In short, a bad check and a few stolen boxes of bug killer justify multi-million dollar overcharges to consumers. Other trivial allocations discussed by the Fourth Circuit (who paid property taxes, who obtained environmental permits, etc.) likewise produced no competitive benefits but were used to justify consumer overcharges.

2. Certiorari is required to assure uniformity between the circuits.

The rules used by the Fourth Circuit conflict with the those used by the Third Circuit in *Toledo Mack Sales v. Mack Trucks*, 530 F.3d 204,224 (3rd Cir. 2008). In that case a terminated dealer alleged Mack Trucks imposed vertical price restraints on its dealers, restricting their ability to compete with each other. The district court granted judgment as a matter of law on the Sherman Act claim at the close of the evidence at trial and plaintiff appealed. The Third Circuit reversed, holding that the benefi-

cial and innocent explanation offered by Mack did not control, since a jury could find that a restrictive result was the true effect. The Third Circuit stated:

> Once again, Mack would have us view the evidence in the light most favorable to it, even though we are bound to do just the opposite at this point in the case. Moreover, Jack Lusty testified that, although Mack claimed that its system of cross-checks was used to ensure that all dealers competing for the same sale received equal sales assistance, the real purpose of cross-checks was to prevent dealers from competing effectively with one another.

The Third Circuit rule comports with *Leegin* and the rule of reason.

CONCLUSION

The Fourth Circuit applied pre-*Leegin* rules to explicit vertical price setting that caused consumer overcharges. The petition for a writ of certiorari should be granted to apply the rule of reason.

Respectfully submitted,

David Barry
Barry & Associates
Pier 9, Suite 112
San Francisco, CA 94111
P: 415.398.6600
F: 415.398.6123
E: david@barryfirm.com

David D. Bland
Weaver, Bennett & Bland, PA
P.O. Box 2570
Matthews, N.C. 28106
P: 704.844.1400

Forrest A. Ferrell
Warren A. Hutton
Sigmon, Clark, Mackie, Hutton,
Hanvey & Ferrell, PA
P.O. Drawer 1470
Hickory, N.C. 28603
P: 828.328.2596

Attorneys for Petitioners

June 22, 2009

No. _____

In The
Supreme Court of the United States

VALUEPEST.COM OF CHARLOTTE, INCORPORATED, formerly known as Budget Pest Prevention, Incorporated; NATIONAL PEST CONTROL, INCORPORATED; PEST PROS, INCORPORATED, individually and on behalf of persons similarly situated,

Petitioners,

v.

BAYER CORPORATION; BAYER CROPSCIENCE LP; BASF CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

David Barry
Counsel of Record
Barry & Associates
Pier 9, Suite 112
San Francisco, CA 94111
(415) 398-6600

David D. Bland
Weaver, Bennett & Bland, PA
Post Office Box 2570
Matthews, NC 28106
(704) 844-1400

Forrest A. Ferrell
Warren A. Hutton
Sigmon, Clark, Mackie,
Hutton, Hanvey & Ferrell, PA
Post Office Drawer 1470
Hickory, NC 28603
(828) 328-2596

Attorneys for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

PUBLISHED

UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1760

VALUEPEST.COM OF CHARLOTTE, INCORPORATED, formerly known as Budget Pest Prevention, Incorporated; NATIONAL PEST CONTROL, INCORPORATED; PEST PROS, INCORPORATED, individually and on behalf of persons similarly situated,

Plaintiffs-Appellants,

v.

BAYER CORPORATION; BAYER CROPSCIENCE LP; BASF CORPORATION,

Defendants-Appellees, and

ORKIN, INCORPORATED; THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP,

Defendants.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Judge. (1:05-cv-00090-LHT)

Argued: January 29, 2009

Decided: March 24, 2009

Before WILKINSON, TRAXLER, and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Traxler and Judge Shedd joined.

COUNSEL

ARGUED: David Barry, BARRY & ASSOCIATES, San Francisco, California, for Appellants. Glen David Nager, JONES DAY, Washington, D.C., for Appellees.

ON BRIEF: Michael D. Bland, Benjamin L. Worley, WEAVER, BENNETT & BLAND, P.A., Matthews, North Carolina; Forrest A. Ferrell, Warren A. Hutton, SIGMON, CLARK, MACKIE, HUTTON, HANVEY & FERRELL, P.A., Hickory, North Carolina, for Appellants.

Larry S. McDevitt, VAN WINKLE, BUCK, WALL, STARNES AND DAVIS, P.A., Asheville, North Carolina; Lawrence D. Rosenberg, JONES DAY, Washington, D.C.; George T. Manning, JONES DAY, Atlanta, Georgia, for Appellees Bayer Corporation and Bayer CropScience LP.

Douglas W. Ey, Jr., Catherine E. Thompson, William C. Mayberry, Jason D. Evans, HELMS, MULLIS & WICKER, P.L.L.C., Charlotte, North Carolina, for Appellee BASF Corporation.

OPINION

WILKINSON, Circuit Judge:

In this Sherman Act suit, plaintiffs, who provide pest control services to individual customers, allege that defendants, who manufacture pesticides, illegally conspired with their distributors to set minimum resale prices of certain termiticide products. Specifically, plaintiffs claim that defendant manufacturers Bayer CropScience LP and Bayer Corp. (hereinafter collectively referred to as "Bayer") and BASF Corp. each engaged in the practice known as "resale price maintenance" or "vertical price fixing"—Bayer with its product Premise and BASF with its product Termidor. Defendants counter that *United States v. General Electric Co.*, 272 U.S. 476 (1926), held that a manufacturer may lawfully set minimum prices for its products when there is a genuine principal-agent relationship between the manufacturer and its distributors, and that such relationships existed here. Plaintiffs rejoin that *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), implicitly overruled *General Electric*, and in the alternative argue that the agency relationships between defendants and their distributors were a sham. Because *Leegin* did not eliminate the agency defense to a claim of resale price maintenance and the agency relationships between defendants and their distributors were genuine, we find no basis for antitrust liability and thus affirm the district court's grant of summary judgment to defendants.

I.

In 1996, Bayer introduced Premise, a termiticide that uses the active ingredient imidacloprid. Premise is a liquid "nonrepellent" termiticide. Prior to Premise's arrival to the market, the only liquid termiticides were repellents, which create a chemical barrier around a house or other structure that prevents termites from entering. Non-repellent termiticides are similarly used to create a barrier around a structure, but do not repel termites; instead, the barrier they create is poisonous to termites that pass through it. The poison does not kill the termites immediately. Termites carry it back to their nests and likely spread it to the entire colony. Non-repellents are highly efficacious and have steadily grown in market share since their introduction.

Bayer initially sold its Premise products to the distributors of its other pesticide products. One of those distributors is a company now known as Univar USA, Inc., which is one of the nation's largest distributors of termiticides to pest management professionals ("PMPs"), who provide pest control services to homeowners and other individual customers. Univar and other distributors then resold the products to PMPs such as plaintiffs Valuepest.com of Charlotte, Inc. (formerly Budget Pest Prevention, Inc. and hereinafter "Valuepest"), National Pest Control, Inc., and Pest Pros, Inc. This arrangement continued for several years.

Then, in 2000, Aventis CropScience, L.P. began selling Termidor, a new non-repellent termiticide using the active ingredient fipronil. In early 2000, Aventis began selling Termidor directly to a select

group of 200 PMPs, which was expanded to a group of 400 in July. In September of 2000, however, Aventis began distributing Termidor through Univar and other distributors pursuant to non-exclusive agency agreements. The agency agreements provided that Aventis was the seller of Termidor to PMPs, while the distributor-agent merely facilitated that transaction. Further, the agreements specified that Aventis retained title to the Termidor until it was sold to a PMP. The agents received commissions for the sales they facilitated. The agency arrangement allowed Aventis to set the price at which Termidor was sold to PMPs.

According to Bayer, after experiencing the benefits of the Termidor agency arrangement, some distributors became unhappy with the distribution arrangement for Premise. The agency contracts were more profitable to distributors than the previous distribution arrangement, in which the distributors purchased Premise from Bayer and resold it to PMPs. Bayer, dependent on its distributors for marketing, became concerned about losing sales if distributors chose to encourage PMPs to purchase Termidor instead of Premise—which the distributors had every incentive to do, given that they made more money selling Termidor.

Thus, in January of 2001 Bayer began selling Premise through an agency program similar to that used by Aventis. Bayer continued to use its old distributors, but whereas before the distributors had purchased the product from Bayer, the new agency agreements stated that Bayer would retain title to the Premise until it was sold to a PMP. The agreements further specified that Bayer would set the

retail prices and that the distributors would receive a fixed commission for each sale.

In October of 2001, Bayer's and Aventis's respective boards of directors announced a plan in which Bayer would purchase all shares of Aventis. An investigation by the Federal Trade Commission ("FTC") ensued. The FTC approved the acquisition, which was completed in June of 2002, but required that Bayer divest assets relating to fipronil, Termidor's active ingredient. BASF acquired the fipronil assets from Bayer on March 21, 2003, and since that date has manufactured and sold Termidor in the United States. BASF became the assignee of the earlier agency contracts for Termidor, and continues to sell Termidor using agency agreements. Bayer ceased selling Premise via agency contracts in 2005.

On April 25, 2005, Valuepest filed a class action lawsuit in the United States District Court for the Western District of North Carolina, alleging vertical price fixing by Bayer, BASF, and other defendants in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The complaint was amended three times, adding and then dropping a claim, dismissing defendants other than Bayer and BASF, and adding National Pest Control and Pest Pros as plaintiffs and proposed class representatives.

On November 21, 2006, plaintiffs and defendants each filed motions for summary judgment; plaintiffs also filed a petition for class certification.[1] While the

---

[1] The parties agreed that the district court would resolve first the vertical price fixing claims with respect to only one of Bayer's and BASF's distributors, Univar, and that the court's resolution of the claims regarding to Univar would

district court was considering these motions, the Supreme Court held argument in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). The district court issued an order stating it would wait to rule on plaintiffs' summary judgment motion until after *Leegin* was decided, but would continue consideration of defendants' motions. Two weeks after the Supreme Court handed down its decision in *Leegin*, the district court granted summary judgment for defendants on the ground that defendants' contracts with their distributors represented genuine agency relationships that did not support liability under § 1. The court also denied plaintiffs' motion for class certification as moot. Plaintiffs now appeal.

II.

Plaintiffs insist in their briefs and at oral argument that after *Leegin* the agency defense under *General Electric* to a claim of resale price maintenance is no longer viable. This argument fails because the two cases dealt with two separate elements of antitrust liability: *General Electric* addressed what types of relationships constitute agreements to set prices for purposes of the Sherman Act, while *Leegin* concerned whether such agreements, once proven, should be considered *per se* unlawful or evaluated for their reasonableness. The

---

"set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors." J.A. 430. Accordingly, in our subsequent analysis of the claims we discuss only the facts related to the agreements with Univar.

structure of § 1 of the Sherman Act makes the different focus of the two decisions clear.

Section 1 forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,'" the Supreme Court has repeatedly made clear that "Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Showing a violation of § 1 thus requires proof of two elements: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002).

The first element requires proof of some kind of agreement, for "[i]ndependent action is not proscribed." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Plaintiffs must provide "evidence of a relationship between at least two legally distinct persons or entities." *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (en banc). Thus only alleged resale price maintenance that actually involves an agreement between two parties comes within the scope of § 1. Prohibited resale price maintenance is the practice by which a manufacturer and a distributor agree on a minimum price below which the distributor will not sell the manufacturer's products. *See* 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* 206-07 (2d ed. 2004). Unilateral action by a manufacturer does not suffice to implicate § 1; a manufacturer can, for example, refuse to sell to retailers who resell its products for less than the manufacturer's preferred

price. *See United States v. Colgate & Co.*, 250 U.S. 300 (1919).

In *General Electric*, the Court addressed an allegation of resale price maintenance by a lamp manufacturer and its network of distributors. The defendant claimed "that its distributors were *bona fide* agents," while the government contended that "the system of distribution adopted was merely a device to enable the [defendant] to fix the resale prices of lamps in the hands of purchasers," and "that the so-called agents were in fact wholesale and retail merchants." *Gen. Elec.*, 272 U.S. at 479. After examining the terms of the contracts between the defendant and its distributors, the Court determined that the distributors were genuinely the manufacturer's agents, and that therefore the scheme did not violate the Sherman Act. *See id.* at 484-88.

The Court reasoned that a manufacturer has the right to sell its products on whatever terms it wishes; it is only when the manufacturer "adopts a combination with others" that the Sherman Act is implicated. *Id.* at 485. Because the Court found that General Electric was indeed selling its lamps directly to consumers via its agents, rather than selling them to the retailers and requiring the retailers to resell them at a fixed price, the defendant was not guilty of unlawful vertical price fixing. *General Electric* thus concerned what facts sufficed in resale price maintenance claims to prove the first element of § 1 liability—whether a "contract, combination," or "conspiracy" existed. 15 U.S.C. § 1.

As a general matter, to support liability an agreement must also satisfy the second element of § 1: it

must be an unreasonable restraint on trade. *See Dickson*, 309 F.3d at 202. Under the longstanding precedent of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), resale price maintenance agreements were considered *per se* unlawful, and plaintiffs who could prove that such an agreement existed did not need to adduce further proof that the agreement unreasonably restrained trade. *Dr. Miles* remained the law for nearly a century until 2007, when it was overruled by the Supreme Court in *Leegin*. In that case, the Court abolished the *per se* rule against resale price maintenance and held that "[v]ertical price restraints are to be judged according to the rule of reason." *Leegin*, 127 S. Ct. at 2725.

Under the rule of reason, a factfinder examines all of the circumstances to determine whether a practice unreasonably restrains competition. *Id.* at 2712. Factors that should be considered "include 'specific information about the relevant business' and 'the restraint's history, nature, and effect,'" *id.* (quoting *Khan*, 522 U.S. at 10), as well as "[w]hether the businesses involved have market power," *id.* (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)). The Court rejected the *per se* rule of *Dr. Miles* as excessively formalistic and not sufficiently grounded in the actual economic impact of vertical price restraints. *Id.* at 2714. The Court looked to a growing consensus in economic theory that vertical pricing agreements, while sometimes anti-competitive, can often have procompetitive effects. *Id.* at 2714-16 (detailing how resale price maintenance can promote interbrand competition by encouraging retailers to invest in promotional efforts, giving customers a range of options including

"low-price, low-service brands" and "high-price, high-service brands," and by facilitating market entry for new products).

Plaintiffs contend that *Leegin* overruled *General Electric* and replaced it with a generalized inquiry into market power and procompetitive benefits even where a genuine agency relationship exists. The foregoing analysis of § 1's structure should make clear why this assertion must be rejected. Plaintiffs' argument conflates the distinction between the two elements required to prove liability under § 1. *General Electric* concerned the first necessary element of §1 liability—the existence of an agreement. Where a manufacturer sells its products through its genuine agents, there is no "contract, combination" or "conspiracy," and thus no basis for antitrust liability. 15 U.S.C. § 1. At issue in *Leegin* was an entirely different question regarding the second element of § 1 liability that applies when an agreement has been proven: should that agreement be considered *per se* unlawful or should it be analyzed under the rule of reason? The two cases dealt with separate and distinct issues, and thus no part of *Leegin*'s reasoning casts the slightest bit of doubt on the underpinnings of the rule of *General Electric*.

Furthermore *Leegin* never once mentioned or cited *General Electric*. The Court has made clear that it "does not normally overturn . . . earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). It would be especially odd for the Court to have overruled *General Electric* by implication given that the Court spent several pages of its decision in *Leegin* explicitly analyzing whether *stare decisis* required adher-

ence to *Dr. Miles*. *See Leegin*, 127 S. Ct. at 2720-25. If the Court had thought that overruling *Dr. Miles* would simultaneously overrule another venerable antitrust precedent, it surely would have said so.

Quite simply, *Leegin* has no bearing on the continued vitality of *General Electric*, and plaintiffs' argument to the contrary cannot stand. The two holdings stand independently of each other. *General Electric* holds that a principal-agent relationship is not an agreement for antitrust purposes, while *Leegin* only addressed the circumstances under which an agreement proven to exist is reasonable under § 1. *Leegin* thus is only relevant if plaintiffs can prove the agency relationships claimed by defendants were a sham. We must thus determine whether the agreements between defendants and Univar were genuine agency relationships under *General Electric*.

III.

It is important at the outset to note why principal-agency agreements are important. The owner of a good may generally set the price at which the good is sold. If one of the benefits of manufacturing a good is to set the price by which it is sold, then it is only sensible not to deprive the manufacturer of its right if, for reasons of efficiency, it chooses to use agents that are loyal to it rather than employees. "Employment relations do not violate the antitrust laws." *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 724-25 (7th Cir. 1986). The cases refusing to extend § 1 liability to genuine agency relationships are premised on the idea that such relationships

"should be treated like employment relations." *Id.* at 725; *see also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

Several factors are important in our evaluation of the relationships at issue here. Once again, *General Electric* is instructive. General Electric sold its lamps to consumers via a consignment arrangement with retail and wholesale merchants. *Gen. Elec.*, 272 U.S. at 481-83. Prices were set by GE, and the dealers received fixed commissions. *Id.* GE retained title to the lamps in the possession of the agents until they were sold to actual consumers. *Id.* at 482. The manufacturer also assumed the risk of loss from fire, flood, obsolescence, and price decline, paid the taxes on the lamps, and carried insurance on the stock. *Id.* at 483. The agents were required to pay for all expenses related to storage, transportation, sale, and distribution of the lamps, and were responsible for lamps lost or damaged while in the agent's care. *Id.* at 482-83. The agents collected payments from customers and remitted the proceeds to the manufacturer, less their commission. *Id.* at 482.

After reviewing the details of the arrangement, the Court found "nothing in the form of the contracts and the practice under them" that made the distributors "anything more than genuine agents of the company." *Id.* at 484. The Court stressed several facts, including that the agents were not required to pay for the lamps until they had been sold to customers and that the title of the lamps passed directly from the manufacturer to the consumer at the time of sale. *Id.* The Court did not find the agents' obligations to pay for lost or damaged lamps or to pay for storage, transportation, sale, and distribution expenses inconsistent with a genuine agency rela-

tionship. *Id.* Nor did the "circumstance that the agents were in their regular business wholesale or retail merchants, and under a prior arrangement had bought the lamps, and sold them as their owners" preclude GE from changing the relationship to one of genuine agency. *Id.* at 484-85.

The Court's other major case on the agency defense to a claim of resale price maintenance is *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1963). At issue in that case was an oil company's scheme to set the retail price of its gasoline sold to customers by gas stations. Under the purported consignment agreement, retailers received commissions on gasoline sold, and the title to the consigned gasoline passed directly from the oil company to the consumer at the time of sale. *Id.* at 15. The oil company paid property taxes on the gasoline held by the retailers, but the retailers were required to carry personal liability and property damage insurance and were responsible for virtually all losses of the gasoline in their possession. *Id.*

The Court held that the arrangement constituted unlawful resale price maintenance. *Id.* at 24. It observed that the dealers were "independent businessmen" possessing "all or most of the indicia of entrepreneurs, except for price fixing." *Id.* at 20. The Court acknowledged that consignment is a legitimate method for an owner to sell his property. *Id.* at 21. But it looked beyond the agreements' form to consider their substance, and concluded they were precisely the kind of price-fixing arrangement that § 1 was meant to prevent. *Id.* at 24. "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to

make legality for antitrust purposes turn on clever draftsmanship," the Court reasoned. *Id.*

The Court conceded that the agreement upheld in *General Electric* "somewhat parallels the one in the instant case." *Id.* at 22-23. The Court distinguished *General Electric* on the ground that that case concerned patented articles, and found its holding "not apposite to the special facts here." *Id.* at 23. In dissent, Justice Stewart called the Court's ground for distinguishing *General Electric* "specious," for the *General Electric* Court "gave no intimation whatsoever that its conclusion would have differed in any respect if the consigned article had been unpatented." *Id.* at 27-28 (Stewart, J., dissenting).

Some subsequent commentators have agreed with Justice Stewart that the holdings in *General Electric* and *Simpson* are irreconcilable. *See, e.g.*, Terry Calvani & Andrew G. Berg, *Resale Price Maintenance after Monsanto: A Doctrine Still at War with Itself*, 1984 Duke L.J. 1163, 1178. However, "courts generally have not interpreted *Simpson* as a blanket condemnation of all consignment agreements in which the manufacturer/supplier sets retail prices." *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809 (5th Cir. 1979). Nor should they have. It cannot "seriously be argued that the ancient and ubiquitous practice of principals' telling their agents what price to charge the consumer is just some massive evasion of the rule against price fixing." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986). Otherwise, perverse results would obtain—such as a homeowner being guilty of violating § 1 "when he tells his broker at what price to sell his home." *Id.* at 1436.

Instead, courts have read *Simpson* to require a careful inquiry into a purported agency agreement, in order to determine whether it is genuine or a sham. Courts must look "to the substance of the parties' dealings rather than merely to form." *Marty's Floor Covering Co. v. GAF Corp.*, 604 F.2d 266, 269 (4th Cir. 1979). In this inquiry, courts have considered most important how business risks were allocated between the parties. "If a distributor deals with his supplier as an 'independent businessman' who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risks of transactions with the customers . . . it is likely that the distributor is merely an agent for the manufacturer." *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1223 (8th Cir. 1987) (citations omitted); *see also Farm Stores, Inc. v. Texaco*, 763 F.2d 1335, 1344 (11th Cir. 1985); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 342-43 (9th Cir. 1983).

Looking to the distribution of business risks is sensible. If a manufacturer designates a distributor its agent yet insists that the distributor bear most or all of the traditional burdens of ownership, it is likely that the claimed agency relationship is merely a "clever manipulation of words," *Simpson*, 377 U.S. at 22, and not a legitimate business arrangement that should be protected by law. On the other hand, when a manufacturer is willing to assume the burdens associated with ownership, it should be entitled to the benefits as well—including the right to sell its property through an agent. *See id.* at 21 ("[A]n owner of an article may send it to a dealer

who may in turn undertake to sell it only at a price determined by the owner. There is nothing illegal about that arrangement.").

Courts also consider the economic justification offered for the agency agreement. The Seventh Circuit, noting the *Simpson* Court's concern that the oil company had merely evaded the rule against resale price maintenance by labeling its arrangement an agency relationship, held that in such cases courts should ask "whether the agency relationship has a function other than to circumvent the rule against price fixing." *Morrison*, 797 F.2d at 1436. As with the inquiry into the distribution of risks, considering economic justification helps distinguish between those arrangements that further the goal of antitrust law and those that subvert it. "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." *Id.* at 1437. Agency relationships that have strong business justifications are the ones most likely to promote efficiency; those created merely to avoid antitrust scrutiny are the most likely to be inefficient and harmful to consumers.

Finally, courts look to whether the agency agreement is a product of coercion. *See, e.g.*, *Day*, 400 F.3d at 1278. The Court in *Simpson* was concerned that the defendant oil company exercised coercive power over the gasoline retailers, for the retailers depended entirely on the contracts with the oil company for their business. *See Simpson*, 377 U.S. at 21. With these factors in mind, we now turn to an examination of the "substance" of the relationships between defendants and Univar. *Marty's Floor Covering Co.*, 604 F.2d at 269.

IV.

A.

In examining Bayer's and BASF's contracts with Univar, the threshold question is which party bore the risk of loss. We find that this factor weighs in favor of a genuine agency relationship. First, as a formal matter, both Bayer and BASF retained title on their respective products while in Univar's possession, and the agreements specified that defendants, not Univar, bore the risk of loss on the termiticides until they were delivered into the hands of PMPs. While plaintiffs not surprisingly seek to dismiss the retention of title as a mere formality, such traditional incidents of property law, embodied here in the agency agreements, have real significance. And beyond the formal labels in the agreements, defendants also satisfied the standard in substance. They retained many of the burdens of ownership, indicating the agency relationships were authentic. The evidence strongly supports the conclusion that the risk of loss was borne by defendants.

A number of facts support the conclusion that defendants bore the risk of loss. The agreements required that Univar store defendants' termiticides separate from Univar's own property, and label the products as belonging to defendants. The agreements squarely placed the risk of economic loss due to nonpaying PMPs on defendants' shoulders. Both defendants' agreements set limits on the amounts of credit Univar could extend to purchasers, and required defendants, not Univar, to pursue delinquent purchasers. Under the contracts, defendants retained the right to audit Univar for compliance with

the agency agreements; BASF, at least, audited Univar annually. Bayer's contract with Univar explicitly stated that Bayer would pay all property taxes on the Premise owned by Bayer.

Beyond the formal terms of the agreements, Bayer and BASF bore the risk of loss in practice as well. As the district court concluded, "testimony from representatives of Bayer, BASF, and Univar . . . confirm that Bayer and BASF actually retain both title and the risk of loss on Premise or Termidor, respectively" until sold to PMPs. J.A. 449. When Termidor in Univar's possession was stolen on two occasions, BASF, not Univar, wrote off the losses. When Univar suffered a credit loss on a sale of Premise, Bayer reimbursed Univar. Invoices sent to PMPs buying Premise or Termidor stated that the products were owned by Bayer or BASF, not by Univar.

Plaintiffs' arguments that defendants did not actually bear the risk of loss are unavailing. They contend that the fact Univar was required to carry insurance against its own negligence is evidence that Univar bore the risk of physical loss, but it makes perfect sense for a principal to require a genuine agent to be responsible for the agent's own carelessness in order to discourage it. *See Day*, 400 F.3d at 1277. Plaintiffs point out that until recently both defendants failed to pay property taxes on their products held by Univar in a number of states. But Univar never paid property taxes on the termiticides either, and Bayer's agreement, at least, assigned this responsibility to Bayer, not Univar. Furthermore, BASF paid inventory taxes on its Termidor.

Plaintiffs claim that the fact that defendants' insurance deductibles for their termiticides are greater than the amount of product stored at any one Univar location means that Univar bore the risk of loss. This conclusion does not follow; simply because defendants have made the business decision not to insure against the loss of their products from Univar's locations does not mean that they do not bear the risk of that loss. Plaintiffs point out that Univar designed its accounting system so that Univar took title to the pesticides at the moment of sale. However, this bookkeeping method, utilized by Univar in order to minimize Univar's tax liability, was clearly inconsistent with the clear terms of the agency agreements, and, so far as the record shows, was not even known to defendants.

Plaintiffs argue that Univar bore the risks associated with PMPs paying Univar by credit card. To alight on such an accepted method of payment as material is grasping at straws. Moreover, according to the agreements Univar was not required to accept credit cards in the first place. That Univar chose to attract customers in this manner and increase its commission income under the agency arrangement does not prove that the relationship was anything other than genuine. *See Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989). Plaintiffs are apparently under the misapprehension that an agency relationship must be devoid of any indication of entrepreneurship on the part of the agents involved. This view simply overlooks the point that every business relationship, however characterized, will have some elements of enterprise. *Simpson* directed that courts should be wary of arrangements where the purported agent possesses

"all or most of the indicia of entrepreneur[ship]," 377 U.S. at 20, but that is a far cry from saying that agents cannot have *any* of those attributes. The agent in a principal-agency relationship need be loyal, but not robotic.

Thus, we find that defendants, not Univar, bore the risk of loss of the termiticides—a factor which strongly supports a determination that Univar was a genuine agent of defendants. *See Ryko Mfg. Co.*, 823 F.2d at 1223. The other two significant factors also weigh in favor of a genuine agency relationship. We review each in turn.

First, the record indicates that defendants used the agency sales method for legitimate business reasons. When Aventis first launched Termidor, it chose to use the agency method in order to retain more control over how Termidor was sold to PMPs than would have been possible under a more traditional distribution arrangement. The company wanted Termidor to be seen as a premium product of high efficacy, and thus wanted to retain control over how the product was presented to PMPs. Further, because Termidor was an entirely new termiticide, the company wanted through its agents to restrict sales to PMPs who had been trained how to use the product appropriately. Releasing a new product in a highly competitive marketplace is a difficult endeavor. In such a venture, the agency method can be useful because it enables a manufacturer to retain more control over how its product is marketed than it would if it merely sold the products to distributors. True resale price maintenance can usefully promote interbrand competition. *See Leegin*, 127 S. Ct. at 2714-16. Agency arrangements may likewise be

suited to do so, given the greater control they give manufacturers over product presentation. The decision by Aventis, and later BASF, to use the agency method seems justified by sound business reasons.

Bayer, for its part, elected to switch to the agency sales method not out of a desire to fix prices, but because distributors preferred the agency method and the commissions they received from it to the traditional distribution method Bayer had been using. Bayer was forced to switch to the agency method in order to stay competitive. Certainly a desire to emulate a successful business model cannot be said to be an illegitimate business motive. Both defendants had legitimate business reasons for using the agency method.

Second, there is no evidence whatsoever that the agency agreements were the product of coercion. Unlike the gasoline retailers in *Simpson*, Univar was not dependent on the agency contracts for its livelihood; indeed, they constituted no more than a small fraction of its business. The record indicates that far from being compelled to adopt the agency sales method, distributors like Univar actually preferred it.

Thus, the factors courts consider when evaluating whether an agreement creates a genuine agency relationship militate in favor of finding that such a relationship existed here.

B.

Notwithstanding the several factors that weigh in

favor of a genuine agency relationship, plaintiffs make several additional arguments against that conclusion. First, plaintiffs argue that distributors like Univar could not be agents while serving Bayer and BASF simultaneously. This argument is premised on a misunderstanding of the agency method, in which nonexclusive relationships are common. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), the Seventh Circuit held that a travel service operator was an airline's genuine agent notwithstanding the fact that the relationship was nonexclusive, for "this is a common form of organization. Real estate agents work for many clients, and multiple-listing services allow many agents access to the same properties; auction houses sell works of art furnished by hundreds of owners at a single sitting." *Id.* at 752-53. Plaintiffs cite no case for the proposition that only exclusive agency relationships are genuine for antitrust purposes.

Second, plaintiffs make a number of related arguments about actions taken by Univar that plaintiffs suggest should instead have been taken by defendants. For example, plaintiffs state that Univar, not defendants, took out pesticide licenses. They point out that Univar hired and fired employees and paid for workers' compensation insurance. Plaintiffs emphasize that Univar, not defendants, sent bills to PMPs. Plaintiffs also note that Univar remitted payment to defendants less its commission rather than being paid by defendants for services rendered. They draw attention to the fact that Univar, not defendants, dealt with expenses relating to its warehouses and paid for warehouse insurance.

These arguments ignore the reasons why a manufacturer would use sales agents in the first place. It is hardly surprising that many effective agents have experienced employees and tested business techniques of their own. Univar, as a distributor that already sold many companies' pesticides, had low overhead costs and was in a better position to make staffing decisions, deal with licensing requirements, bill customers, and maintain its warehouses than were defendants. It was reasonable for defendants to leave those matters to the party best positioned to deal with them. Defendants chose to use Univar as an agent precisely because, with its robust pesticide distribution business, it was well-equipped to handle retail transactions more efficiently than could Bayer or BASF themselves. If the rule were otherwise—that is, if a manufacturer could not leave to an agent the responsibility for dealing with hiring employees and so on—there would be little reason for a manufacturer to use agents rather than employees. But "[e]fficiency would not be promoted by a rule that forbade principals to tell their agents at what price to sell the principal's product unless the agent was an employee." *Morrison*, 797 F.3d at 1437.

In sum, we find unconvincing plaintiffs' various arguments that the agency agreements at issue in this case were shams. Because the agency relationships between defendants and Univar were genuine, neither defendant violated § 1.[2]

---

[2] Because we conclude that there was no substantive § 1 violation, we need not reach defendants' argument that plaintiffs failed to prove injury as required by § 4 of the Clayton Act, 15 U.S.C. § 15.

V.

Section 1 of the Sherman Act and the Supreme Court's cases interpreting it attempt to strike a balance. The law must prevent agreements that undermine the principle of competition necessary to make a free market function. Yet if law sweepingly declares off-limits business methods that companies might opt to use for legitimate commercial reasons, consumers—the intended beneficiaries of antitrust law—are worse off. The Court's cases on resale price maintenance have walked this sensible path. Under *General Electric*, manufacturers can use the agency method to distribute their products. Yet under *Simpson*, a distribution method labeled "agency" but that in substance is simply an agreement between manufacturers and retailers to fix prices can create liability under

§ 1. Here we are persuaded that the relationships at issue stand comfortably on the *General Electric* side of the line. Because the agency contracts are legitimate business arrangements, and not unreasonable restraints on trade creating potential § 1 liability, the judgment is affirmed.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

CIVIL NO. 1:05CV90
Memorandum and Order

VALUEPEST.COM OF CHARLOTTE, INC., f/k/a Budget Pest Prevention, Inc.; NATIONAL PEST CONTROL, INC.; and PEST PROS, INC., individually and on behalf of persons similarly situated,

Plaintiffs

v.

BAYER CORPORATION; BAYER CROPSCIENCE, L.P.; and BASF CORPORATION,

Defendants

THIS MATTER is before the Court on the summary judgment motions of Defendants Bayer Corporation/Bayer Cropscience, L.P., and BASF Corporation. For the reasons set forth below, both motions for summary judgment are allowed.

I. BACKGROUND

Plaintiffs, a group of independent pest control operators in Western North Carolina, filed this suit against Defendants Bayer Corporation/Bayer Cropscience, L.P. [Bayer] and BASF Corporation [BASF] individually and separately as a class action[3] pursuant to Rule 23 of the Federal Rules of Civil Procedure for violations of the Sherman Act, codified at 15 U.S.C. § 1. Fourth Amended Complaint, filed November 17, 2006, at 1-4. Specifically, Plaintiffs allege Defendants Bayer and BASF have engaged in a form of vertical price fixing with their numerous distributors – such as Univar USA, Inc. [Univar] – regarding the sale of the products Premise and Termidor, respectively, which are chemical products used to kill termites. *Id.* at 2. Although Plaintiffs allege Defendants have engaged in price fixing with a vast number of their Premise or Termidor distributors, the parties have stipulated to first resolve Plaintiffs' allegations regarding Defendants' individual relationships with the common distributor Univar. Certification of Initial Attorney Conference, filed September 8, 2005, at 2. It is the parties' intention that the resolution of Plaintiffs' claims against Defendants as to their relationships with Univar will set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors. *Id.*

In 1996, Bayer introduced a new type of termite-prevention chemical, labeled "Premise," into the pest

---

[3] Because the Defendants' motions for summary judgment will be granted, Plaintiffs' motion for class certification is now moot and will not be addressed.

control market. Fourth Amended Complaint, *supra*, at 1, 5-6. Premise essentially revolutionized the termite control market because it effectively killed termites rather than simply repelling termites, as the previous generation of chemicals used by termite control businesses had relied upon. *Id.* In 2000, Aventis Environmental Sciences [Aventis] introduced a new product labeled "Termidor" into the termite control market which had a similar effect as Premise but was comprised of different chemicals and was arguably more effective than Premise. Defendant Bayer's Memorandum in Support of Summary Judgment, filed November 21, 2006, at 2; Defendant BASF's Memorandum in Support of Summary Judgment, filed November 21, 2006, at 5-6. Premise and Termidor were both huge successes and have virtually rendered previous termite repellant chemicals obsolete. Fourth Amended Complaint, at 1.

Bayer originally distributed its product Premise on a buy-sell or retail relationship with the distributors of its other chemicals. Bayer's Memorandum, *supra*, at 4. In other words, Bayer would sell Premise to distributors, such as Univar, and the distributor would in turn sell Premise to individual pest-control businesses. *Id.* Through this relationship, distributors were allowed to set their own prices for Premise. *Id.* Aventis, on the other hand, began marketing Termidor through agency agreements with distributors, such as Univar. *Id.* at 5; BASF's Memorandum, *supra*, at 6-7. Although these agency agreements drastically altered the rights and responsibilities between manufacturer and distributor as compared to the traditional retail/buy-sell arrangement, the agency agreements created greater

incentives for the distributors to promote Termidor. As a result, numerous distributors entering into the agency agreements with Aventis began losing interest in carrying Premise on a retail basis. Bayer's Memorandum, *supra*, at 5. In response, Bayer began offering to sell Premise, and only Premise, through agency agreements with distributors in a similar fashion as that employed by Aventis. *Id.* at 5-6.

In 2002, Bayer acquired Aventis, which included the rights to the Termidor product. BASF's Memorandum, *supra*, at 8. However, the Federal Trade Commission investigated Bayer's acquisition of Aventis and concluded that the transaction could only be permitted if Bayer divested the portion of Aventis' business which included products using the chemical fipronil, which included the Aventis product Termidor. *Id.* Accordingly, Bayer managed the fipronil-based business separately from its other products until BASF acquired the fipronil business from Bayer in 2003. *Id.* BASF is the current owner and manufacturer of the Termidor product, and continues to operate the Termidor-related business in the same way as its predecessor, Aventis, including the agency agreements with distributors such as Univar that were previously established by Aventis. *Id.* at 9.

As stated above, Plaintiffs are independent pest control operators who have purchased either Premise or Termidor from distributors such as Univar in the previous four years. Fourth Amended Complaint, *supra*, at 3. Plaintiffs allege Defendants Bayer and BASF have illegally fixed the prices of Premise and Termidor, respectively, thereby eliminating the numerous distributors' independent entrepreneurial

price setting abilities. *Id.* at 8-9. Plaintiffs assert they are members of a class in excess of 10,000 members who have been similarly injured, and claim Defendants' illegal price fixing activities have overcharged the individual Plaintiffs by approximately $1,875.00 per technician per year. *Id.* at 9. Cumulatively, Plaintiffs allege their damages amount to over $50 million over four years. *Id.*

The parties have concluded discovery, and both Defendants Bayer and BASF have separately filed motions for summary judgment on the basis that the existing agency agreements between the respective Defendants and the distributors negate any price fixing claim asserted against them as a matter of law. All parties have filed numerous documents with the Court regarding these motions, and the matters are now ripe for ruling.

II. STANDARD OF REVIEW

A motion for summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary judgment is proper 'unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 249 (1986)). "In considering a motion for summary judgment, under Federal Rule of Civil Procedure 56(c), a court must provide 'adequate time for discovery' to a party that has failed to show the existence of a genuine issue of material fact before granting the motion." *Worm v. American Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the . . . pleading[s], but [must] . . ., by affidavits or as otherwise provided in [Rule 56], . . . set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Said another way, the nonmoving party "'cannot create a genuine issue of fact through mere speculation or the building of one inference upon another.'" *Harleysville Mut. Ins. Co. v. Packer*, 60 F.3d 1116, 1120 (4th Cir. 1995) (citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). Furthermore, "the 'mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986)). Finally, in considering the facts for the purposes of this motion, the Court will view the pleadings and material presented in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

III. ANALYSIS

Both Defendants Bayer and BASF assert that their relationship with Univar was and remains an agency relationship; therefore, both Defendants were and are allowed to compel Univar as their agent to sell the Premise and Termidor products at specific prices without violating § 1 of the Sherman Act. Bayer's Memorandum, at 1-2; BASF's Memorandum, at 1. Plaintiffs, however, contend Defendants' relationship with Univar is not truly an agency relationship, but rather Univar is an independent distributor of Defendants' products hiding behind a sham agency set up. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment ["Plaintiffs' Response"], filed December 20, 2006. Though Plaintiffs attempt to infer guilt based upon contradictions between Defendants' separate arguments, the circumstances of this case compel the Court to examine each Defendant independent of its co-Defendant. *Id.* at 1. Despite their similarities and, at times, close dealings, the Defendants are independent entities with different facts associated with them. Accordingly, the Court will analyze each Defendant independently and not draw inferences one way or the other based upon the conduct of its co-Defendant.

A. Controlling Precedent

Plaintiffs filed this action against Defendants under § 1 of the Sherman Act, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . ." 15 U.S.C. § 1. Said another way, "Section 1 of the Sherman Act .

. . reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). Therefore, to prove a violation of § 1 of the Sherman Act, a plaintiff must establish, "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002) (citing *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991)). Thereafter, the plaintiff must also prove "the existence of '*antitrust* injury, which is to say injury of the type the anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* at 202-03 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).

One specific type of § 1 violation courts have addressed – and which Plaintiffs presently allege against Defendants – is known as "resale price maintenance" or "vertical price fixing" and occurs when "a seller of goods attempts to set the price at which his buyer resells the goods to a second buyer." *See Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1222 (8th Cir. 1987). To establish a case of resale price maintenance or vertical price fixing against a manufacturer, "the antitrust plaintiff must demonstrate that (1) the manufacturer has contracted, combined, or conspired (2) with a separate economic entity (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent purchaser." *Id.* at 1222-23. Such activity was previously "condemned as inevitably

tending to have a pernicious effect on competition" and was therefore "subject to a rule of *per se* illegality under Section 1 et seq. of the Sherman Act." *Id.* at 1222 (internal citation omitted); *see also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) (noting vertical price fixing was *per se* illegal under the Sherman Act because it was recognized as one of the "certain kinds of agreements [which] so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances.") (citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)) (other citations omitted); *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905, 908 (4th Cir. 1986) ("Concerted action by a manufacturer and its retailers to set or maintain the manufacturer's retail prices violates section 1 of the Sherman Act.") (citing *Dr. Miles*, *supra*). However, the Supreme Court of the United States recently overruled the rationale from *Dr. Miles* and its declaration of *per se* illegality regarding vertical price fixing schemes, instead adopting a "rule of reason" analysis for claims of vertical price fixing. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, __ U.S. __, __, 2007 WL 1835892, at *20

(June 28, 2007) (overruling *Dr. Miles* and holding, "Vertical price restraints are to be judged according to the rule of reason."). The rule of reason analysis is designed to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at *6. Under the rule of reason, "'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Id.* (quoting *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).[4]

In the present case, there is no dispute that Defendants have entered into agreements with Univar to set the minimum resale price for its products. However, courts have routinely held that resale price maintenance between a principal – or, pertinent to the present dispute, a manufacturer – and its agent does not violate the Sherman Act because more specifically vertical price fixing schemes. The *Leegin* "rule of reason" analysis would appear to

[4] The Supreme Court's latest opinion in *Leegin* drastically alters the law regarding antitrust and more specifically vertical price fixing schemes. The *Leegin* "rule of reason" analysis would appear to provide an equally difficult path to success for Plaintiffs. In any event, this Court will continue its analysis of Defendants' motions for summary judgment and use of prior precedent without further briefing from the parties because Defendants' motions concern an agency law analysis in the realm of antitrust law, which remains untouched by the Supreme Court's opinion in *Leegin*.

"[i]n the case of a genuine agency, there can be no combination and conspiracy in restraint of trade, and hence no Sherman Act violation." *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (citing *United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926) (holding "genuine contracts of agency" are not "violations of the Anti-Trust Act[,]" and further explaining "[t]he owner of an article . . . is not violating the common law or the Anti-Trust Act by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.")); *see also Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964) (addressing agency relationships by stating "an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. There is nothing illegal about that arrangement."). Whether a genuine agency relationship exists is a matter of law for the Court to decide. *See Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 628 (4th Cir. 1977) (noting "[t]he district court was justified in concluding *as a matter of law*" that the plaintiff had failed to prove the essential relationship required for a violation of the Sherman Act) (emphasis added); *Day*, *supra*, at 1277 ("Whether U-Haul's relationship with its independent dealers is a genuine agency is a question of law which depends on the nature of that relationship.").

In determining whether a genuine agency relationship exists, a court must not be swayed by the participants' "clever manipulation of words" or "clever draftsmanship" in creating and labeling the relationship as an "agency," but rather must examine the "substance" of the existing relationship to determine if the parties are actually "independent businessmen." *Simpson*, 377 U.S. at 20, 22, 24. Said another way, "[u]nder *Simpson* [the Court is] directed to examine the various substantive 'indicia of entrepreneur[ship]' and the allocation of business risks, rather than the mere form of the agreement, in evaluating the economic substance of an agency or consignment." *Ryko Mfg. Co.*, *supra*, at 1223 (quoting *Simpson*, *supra*, at 20); *see also Day*, *supra*, at 1276-77 ("*Simpson* makes clear that it is the substance of the relationship, not its form or description, that determines whether it is a genuine agency or a sham."). The "key" question to be addressed is "whether the agency relationship has a function other than to circumvent the rule against price fixing." *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1436 (7th Cir. 1986).

Over the years, courts have considered a number of factors when evaluating the independence of a distributor and/or the genuineness of an alleged agency[5] relationship between a manufacturer and its

---

[5] As Defendant BASF correctly notes, the relevant precedent within this field of Sherman Act analyses deals with alleged agency relationships *and* consignment relationships. BASF's Memorandum, *supra*, at 15 n.7. While the two relationships are distinct, they are reviewed in the same way under § 1 of the Sherman Act for the purpose of determining antitrust liability for resale price maintenance. *Compare Day*, *supra*, *with Mesirow v. Pepperidge Farm*,

distributors or dealers. Among the most commonly addressed and significant factors include, but are not limited to, whether the manufacturer or the alleged agent assumes most of the business risks associated with the product – who assumes the risk of loss of the product during the business transaction and before the product is placed in the customer's hands – and whether the manufacturer coerced the dealer into an agreement to abide by its pricing. *See, e.g., Simpson, supra*, at 20-21, 24 (focusing on the notion that the "agent" in the dispute assumed the risk of loss on the product and was coerced into allowing the "principal" or original product owner to set the product's price within a vast distribution system); *Day, supra*, at 1277-78 (noting the "principal" in the dispute "continue[d] to bear the costs of ownership of the equipment," including the assumption of business risks associated with the product and paying taxes on the product); *Ryko Mfg., supra*, at 1223 ("If a distributor deals with his supplier as an 'independent businessman' who bears most or all of the risks on transactions with purchasers, then an agency or consignment agreement is ineffective to insulate the manufacturer from antitrust liability for fixing resale prices. However, where the manufacturer bears the financial risks of transactions with the customers and continues to retain 'title, domin-

---

Inc., 703 F.2d 339 (9th Cir. 1983); *see also Ryko Mfg. Co., supra*, at 1223 (addressing antitrust liability for both agency and consignment relationships under *Simpson* simultaneously). Accordingly, this Court will readily cite the precedent established by cases which are factually based upon agency relationships as well as consignment relationships, but which ultimately address the applicability of § 1 of the Sherman Act to these particular similar business relationships.

ion and control over its goods,' then it is likely that the distributor is merely an agent for the manufacturer.") (quoting *Pogue v. Int'l Indus., Inc.*, 524 F.2d 342, 345 (6th Cir. 1975); *Mesirow*, *supra*, at 341-43 (focusing on the type of distribution system, the allocation of business risks, and coercion in determining the plaintiff's §1 claim failed); *Call Carl, Inc.*, *supra*, at 628 (comparing the facts in *Simpson* to the facts of that case, and noting the "principal" in that case paid all costs of station operation, was responsible for all accidental loss of product, and paid a number of employee benefit costs). However, no one factor is determinative; instead, a court must conduct a balancing test to determine the existence of a genuine agency relationship, and it is possible for a court to find a particular business relationship contains the elements of both genuine agency and independent distribution. *Ryko Mfg.*, *supra*, at 1224 ("A distributor may act as his supplier's agent when performing certain duties in a business relationship, but as an independent entrepreneur when performing others.") (citing *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809-10 (5th Cir. 1979)). In fact, it is quite true that "[n]o hard and fast line . . . can be drawn between the mere sales agent and the dealer or distributor, for these terms denote points, by no means fixed, on a continuum bounded at one end by the manufacturer's full-time employees and at the other by vast, autonomous distribution enterprises . . . ." *Morrison*, *supra*, at 1438. Where the relationships in the present dispute fall on this continuum is the next and key question for determination by this Court.

B. Bayer's and BASF's Relationships with Univar

Regarding the specific individual relationships at issue here, the Court is charged with applying the aforementioned precedent to the present circumstances to determine if the alleged agency relationships between Bayer/Univar and BASF/Univar are genuine agency relationships. Although these relationships, like many other similar arrangements analyzed by the courts over time, are "not totally devoid of indicia of independent operation[,]" when evaluating the genuineness of an alleged agency relationship between Bayer/Univar and BASF/Univar, it is clear to the Court that, as a matter of law, a genuine agency exists between both Bayer/Univar and BASF/Univar, and thus no § 1 violation has occurred. *Call Carl*, *supra*, at 628.

It is undisputed that the relationship between Bayer and Univar originally began as a retail-oriented arrangement, with Bayer selling Premise to Univar, who then acted as an independent distributor and resold Premise to customers. Bayer's Memorandum, at 3. However, in January 2001, and again in 2002, 2003, and 2004, Bayer and Univar executed agreements which explicitly appointed Univar as its agent for the purpose of selling Premise. *See*, Exhibits 6, 7, 10, and 11, Agency Agreements between Bayer and Univar, *included in* Bayer's Appendix to Memorandum in Support of Summary Judgment. The agency agreements state, among other things, that Bayer must approve of Univar's warehouse locations, that Bayer retains title and bears the risk of loss on Premise until the product reaches the customer's hands, requires Univar to state on its invoices to customers that it is acting as Bayer's

agent, and assigns the responsibility of paying state property taxes on the product to Bayer. *Id.* at Exhibit 11, §§ 6, 7, 11. Plaintiffs contend that Bayer's act in changing its relationship with Univar from a retail-oriented arrangement to an agency agreement essentially demonstrates a *per se* attempt to circumvent § 1 of the Sherman Act. Plaintiffs' Response, *supra*, at 1-7. However, Plaintiffs' own arguments contradict its assertions. Plaintiffs state that "[t]here is no admissible evidence to support the allegation that the 'agency' arrangements provided incentives to Univar which caused it to act any different than it acted with a buy-sell relationships or a consignment relationship." *Id.* at 2. Plaintiffs also argue that the reason Univar is not complaining about Defendants' actions is because "Univar and other retailers are making more under agency than they would have under competitive conditions." *Id.* at 8. Clearly, Plaintiffs are confused to assert Univar has no incentive to enter an agency relationship with Bayer, only to later assert that Univar has an incredible incentive – larger profits – to enter the agency relationship. Rather than adopt Plaintiffs' arguments, the undersigned finds this to be a case where "[a] company, faced with severe losses, decid[ed] to change its operations on the retail level to assume direct operation of its own [product] rather than leasing them. The fact that a desire to control retail prices contributed to this decision, far from establishing the illegality of the scheme, requires utilization of the method chosen." *Call Carl*, *supra*, at 628 (finding "[t]he district court was justified in concluding as a matter of law that the [elements of a § 1 violation were] not proven in this case."); *see* Deposition of Dan Carrothers, at 69-79 (recounting Bayer's

decision-making process in switching to an agency relationship with Univar).

The establishment of an agency relationship between BASF and Univar, on the other hand, was not previously a retail-oriented scheme. Rather, BASF inherited the pre-existing agency agreements between Aventis and Univar for selling the product Termidor, and largely continues to operate the relationship in the same way as its predecessor. BASF's Memorandum, *supra*, at 9. Much like the agency agreement between Bayer and Univar, BASF's agreement with Univar states, among other things, that BASF retains title and the risk of loss on all Termidor products until such products reach the customer's hands, that Univar is permitted to sell Termidor only to BASF-approved customers who are trained to use the product, that Univar is to notify customers that the sale is being made on behalf of BASF, and that BASF only receives payment from Univar after Univar has received payment from the customer. *Id.* at 10-11, 19; Exhibit 5, 2004 Agency Agreement between BASF and Univar, *attached to* Exhibit A, Declaration of Karl J. Kisner, *included in* BASF's Evidence in Support of Summary Judgment, filed November 21, 2006, at §§ 2(b), (d). Thus, as with Bayer's agreement, it appears BASF created an agency relationship with Univar. However, though the agreements between Bayer/Univar and BASF/Univar appear on paper to be genuine agency arrangements, precedent compels the Court to examine the substance, rather than the form, of the relationship before declaring as a matter of law whether this alleged agency relationship is or is not genuine. *See Simpson*, *supra*.

C. Risk of Loss

Primary to this Court's analysis is the testimony from representatives of Bayer, BASF, and Univar who confirm that Bayer and BASF actually retain both title and the risk of loss on Premise or Termidor, respectively, from the time it leaves the companies' respective warehouses to the time it is placed in the customer's hands, as set out in the agency agreements. Deposition of Harry Baumgartner, at 19, 22-23 (as to BASF); Deposition of Karl J. Kisner, at 193 (as to BASF); Exhibit D, Declaration of John Bolanos, *included in* BASF's Evidence in Support of Summary Judgment (as to Univar); Deposition of Dan Carrothers, at 78-79 (as to Bayer). While it is true that Univar is required under the agency agreement to retain insurance protecting the product against Univar's own negligent handling, courts have previously recognized that such a requirement is more the result of common sense than an attempt to circumvent the anti-trust laws. *See,* Baumgartner Deposition, at 19; *see also*, *Day*, 400 F.3d at 1277 ("Appellants make much of the contract's exclusions for negligence; it is perfectly reasonable, however, for [the manufacturer] to hold its dealers liable for damage to equipment in their possession when that damage is due to a dealer's own negligence."). Plaintiffs attempt to shift the focus of this analysis by asserting Bayer's and BASF's retention of the risk of loss for Premise and Termidor is essentially a sham because neither company has ever lost money on their respective product, while Univar generally loses money on products which may or may not include Premise or Termidor. Plaintiffs' Response, at 11-14. Plaintiffs also emphasize that both Bayer's and BASF's insurance policies for the Premise and

Termidor products, respectively, have such a large deductible that the policies would theoretically never be called upon if a major loss of product occurred at a Univar location. Plaintiffs' Memorandum in Support of Motion for Summary Judgment of Liability ["Plaintiffs' Memorandum"], filed November, 21, 2006, at 9; Baumgartner Deposition, at 30-32. However, Plaintiffs' claims in this regard are based upon conjecture and hypothetical business accounting methods, none of which have a substantial basis in the record and, therefore, do not weigh heavily on this Court's analysis. *Harleysville Mut. Ins. Co.*, 60 F.3d at 1120 (nonmoving party "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another") (internal citation omitted). Simply because Bayer or BASF has never claimed a loss on either Premise or Termidor through their respective relationships with Univar, or because these Defendants have large insurance policy deductibles that they essentially absorb a potential total loss, does not negate the fact that both Bayer and BASF retain the ultimate risk of loss on their respective products through their agency relationships with Univar. Instead, it is clear to the Court that Bayer and BASF actually retain the risk of loss over their respective products from the point they are manufactured until the time the product is sold to the consumer, and thus Defendants Bayer and BASF have satisfied a significant element of establishing a genuine agency relationship with Univar. Plaintiffs' arguments and proposed evidence to the contrary simply are not substantial enough that a reasonable mind could find otherwise.

D. Coercion

Additionally, there is a complete lack of coercion exerted by Bayer and/or BASF upon Univar to adopt the agency method of business and allow Bayer to set the prices of its product. In evaluating this element of genuine agency, courts have found coercion by a manufacturer on a distributor where the product is so vital to the distributor's business that the distributor has no other choice but to accept the manufacturer's pricing requirements. *See Day*, *supra*, at 1278 ("The Supreme Court's chief concern in *Simpson* was the coercive power wielded by the oil company. The contract in *Simpson* was coercive in that termination of the contract would end a gasoline retailer's business, which was entirely dependent on a 'lease agreement' with United Oil. The gasoline retailers did not have any independent business substantial enough to survive loss of the contract.") (internal citations omitted). However, similar to the finding by the Court in *Day*, the case at bar is distinguished from the case in *Simpson* in that the deposition testimony here demonstrates that Univar has an established, successful business and would easily survive with or without Premise and/or Termidor being on its shelves for sale. Deposition of Ted Worster, at 43. Much like the parties in *Day*, the dealers in the present case sell the products Premise and Termidor as a means of additional income, not as the key life source of their existence. *See Day*, *supra*, at 1278 ("In the case at bar, by contrast, U-Haul has no such coercive power over the independent dealers. These dealers are owners of gas stations, hardware stores, and other similar businesses who also rent U-Haul equipment to the public for additional income. Should the independent

dealers cease to rent U-Haul equipment, they would not lose their entire business."). Plaintiffs misstate the issue by asserting *Bayer* was coerced into entering the agency relationship by Univar and its desire to sell the product Premise *via* agency. Plaintiffs' Response, *supra*, at 19-20. However, as the aforementioned precedent demonstrates, when determining the presence of coercion in a § 1 claim, the Court's focus is on the manufacturer coercing a distributor to comply with its attempted illegal price fixing. Bayer's decision to change its business relationship with Univar is simply not the type of coercion warned of in the relevant precedent. Instead, as stated above, Bayer's switch to an agency relationship with Univar is merely an example of "[a] company, faced with severe losses, decid[ing] to change its operations on the retail level" in accordance with a changing market. *Call Carl, Inc.*, 544 F.2d at 628. Bayer voluntarily chose to alter its business plan regarding Premise from retail to agency sales; and Univar, a successful company which preferred to retain Premise as a product on its shelves but did not *need* the product to remain viable, acquiesced to the change in relationship for the two companies' mutual benefit. Plaintiffs' conjecture and accusations of coercion simply are not supported in the record before the Court as to either Defendant, and thus cannot be foundations to defeat summary judgment. *Harleysville Mut. Ins. Co.*, *supra*.

E. Additional Factors

There are also a number of other indicators that further demonstrate the agency relationship be-

tween Bayer/Univar and BASF/Univar in addition to those of retention of risk of loss and lack of coercion. For example, both Bayer and BASF retain the right to audit Univar. Worster Deposition, at 138; BASF's Memorandum, at 11. Also, both Bayer and BASF set the limits on the amount of credit Univar is allowed to extend to a purchaser of Premise or Termidor. Worster Deposition, *supra.* Further, if a customer defaults on its credit repayments used for purchasing Premise, Univar notifies Bayer or BASF, who then pursues the specific creditor for the amount owed. Deposition of John Canini, at 31. Plaintiffs make an issue of the fact that Bayer and BASF have allegedly failed to pay personal property taxes on the Premise and Termidor stored at Univar locations; however, Univar has also never paid taxes on the Premise or Termidor held in its warehouses. Deposition of Ron Zanco, at 38-39. Contrary to Plaintiffs' assertions, BASF has paid different taxes, such as inventory taxes, on Termidor. BASF's Memorandum, *supra*, at 21. While these factors are not independently determinative, they are nonetheless factors which further demonstrate the agency relationships between Bayer and BASF with Univar. And, much like the previously discussed factors, Plaintiffs' attempts to negate the existence of these factors are simply based upon conjecture, hypothetical theories, and mere scintillas of evidence, none of which are enough to defeat a well plead motion for summary judgment.

However, this is not to say the relationship between Bayer and Univar is completely devoid of "indicia of entrepreneur[ship]." *Simpson*, 377 U.S. at 20. Only recently have both Bayer and BASF begun to pay personal property taxes in certain states on their Premise or Termidor products while they were stored in Univar's warehouses; although as previously stated, Univar did not pay these taxes either. Exhibit 63, BASF Responses to Plaintiffs' First Request for Admissions, *included in* Plaintiffs' Exhibits in Support of Summary Judgment on the Issue of Liability, filed November 21, 2006, ¶¶ 64, 80, 90, 106, 122; Exhibit 78, Bayer's Answers to Plaintiffs' First Set of Requests for Admissions, *included in* Plaintiffs' Exhibits, ¶¶ 64, 90, 106, 122, 170; Zanco Deposition, *supra*. Bayer and BASF also do not own, install, or maintain any of the equipment located in Univar's warehouses. Worster Deposition, at 53-56. Furthermore, Univar continues to bear the cost of shipping and billing to Premise and Termidor purchasers, and bears the total cost of operating its warehouses, including employees' salaries and benefits, as well as warehouse maintenance. *Id.* at 52-53, 60. However, the existence of these indicators is not enough to tip the balance away from classifying the relationships of Bayer and BASF with Univar as agency relationships. Instead, they demonstrate Univar's thriving dual business personalities – as a retailer and as an agent – which Plaintiffs appear to ignore. Considering the totality of the evidence and circumstances surrounding these business relationships, it is clear to the undersigned that "the agency relationship [of Bayer and BASF with Univar] has a function other than to circumvent the rule against price fixing." *Morrison*, 797

F.2d at 1436. Accordingly, this Court finds the agency agreements between Bayer/ Univar and BASF/Univar to be genuine and legitimate and, therefore, Plaintiffs' § 1 claim for vertical price fixing fails.

IV. CONCLUSION

To summarize, the Court finds as a matter of law that the separate relationships between Bayer/Univar and BASF/Univar are more appropriately classified as genuine agency relationships. Most significantly, both Bayer and BASF retain the risk of loss on their respective products while the products are in Univar's temporary possession, and Univar was in no way coerced into entering these agency agreements. Many of the alleged indicators of third-party dealing noted by Plaintiffs are simply the remnants of Bayer's transition from a retail to an agency relationship with Univar. Furthermore, Plaintiffs' numerous allegations also stem from the inability to separate Univar's general business from its specific Premise or Termidor-based business. Pertinent to the present dispute, Univar *legally* acts simultaneously as a national retail distributor of numerous products *and* as an agent for Bayer and BASF with regards to the products Premise and Termidor, respectively. However, Plaintiffs' foundation to defeat summary judgment is composed of generalized hypothetical mathematical calculations and assumptions that do not sufficiently account for the specific variances between Univar's separate identities as a general retailer and as an agent for the respective Defendants. Additionally, a great deal

of Plaintiffs' argument against summary judgment states that Defendant has not produced specific types of evidence which Plaintiffs feel would be necessary for Defendants to succeed on summary judgment. Such arguments are unpersuasive. Plaintiffs cannot defeat summary judgment by essentially claiming that Defendants have not followed Plaintiffs' theory of their own case. Though there may be occasional crossover between Univar's roles, the totality of the evidence before the Court establishes that the relationships between Bayer/Univar and BASF/Univar rest on the agency side of this disputed continuum, rather than the independent third-party retailer side. *See Morrison, supra*; *Ryko Mfg.*, 823 F.2d at 1224. The respective Defendants have sufficiently established their bases to grant summary judgment in their favor, and because Plaintiffs' defenses against Defendants' motions are fueled by conjecture and assumption, the undersigned finds it is appropriate to grant summary judgment in favor of both Defendants Bayer and BASF.

V. ORDER

IT IS, THEREFORE, ORDERED that the motions of Defendants Bayer and BASF for summary judgment are ALLOWED. IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment on the issue of liability is DENIED. IT IS FURTHER ORDERED that the Plaintiffs' motion for class certification is hereby DENIED AS MOOT. A Judgment incorporating the findings herein is filed herewith.

Signed: July 13, 2007

Lacy H. Thornburg
United States
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

CIVIL NO. 1:05CV90

JUDGMENT

VALUEPEST.COM OF CHARLOTTE, INC., f/k/a Budget Pest Prevention, Inc.; NATIONAL PEST CONTROL, INC.; and PEST PROS, INC., individually and on behalf of persons similarly situated,

Plaintiffs

v.

BAYER CORPORATION; BAYER CROPSCIENCE, L.P.; and BASF CORPORATION,

Defendants

For the reasons set forth in the Memorandum and Order filed herewith,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' motion for summary judgment on the issue of liability is **DENIED**, and the motions of Defendants Bayer Corporation/Bayer Cropscience, L.P., and Defendant BASF Corporation for summary judgment are **ALLOWED**, and this matter is hereby **DISMISSED WITH PREJUDICE** *in its entirety.*

Signed: July 13, 2007

Lacy H. Thornburg
United States
District Judge

Supreme Court, U.S.
FILED
JUL 21 2009
OFFICE OF THE CLERK

No. 08-1584

IN THE
Supreme Court of the United States

VALUEPEST.COM OF CHARLOTTE, INC., FKA BUDGET PEST PREVENTION, INC., *ET AL.*,

Petitioners,

v.

BAYER CORPORATION, BAYER CROPSCIENCE, L.P., AND BASF CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS W. EY, JR.
CATHERINE E. THOMPSON
JASON D. EVANS
McGUIREWOODS LLP
100 North Tryon Street
Suite 2900
Charlotte, NC 28202
(704) 343-2076

GLEN D. NAGER
(*Counsel of Record*)
PHILLIP A. PROGER
LAWRENCE D. ROSENBERG
L. TRAMMELL NEWTON, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fourth Circuit correctly held that Respondents' agency arrangements with retailers were genuine, such that Petitioners failed, as a matter of law, to establish the "contract, combination ... or conspiracy" element of a claim under Section 1 of the Sherman Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents make the following disclosures:

Respondent Bayer Corporation: Bayer AG is the parent corporation of, and wholly owns, respondent Bayer Corporation.

Respondent Bayer CropScience, L.P.: Bayer AG indirectly owns respondent Bayer CropScience, L.P., as follows: Bayer CropScience, L.P. is a Delaware limited partnership owned by two limited partners, BayerCropScience LLC ("BCSLLC") and Bayer CropScience, Inc. ("BCSI"), and a general partner, Bayer CropScience Holding Inc. ("BCHI"). BCSLLC is wholly owned directly by co-respondent Bayer Corporation, which is wholly owned by Bayer AG. BCSI and BCHI are both wholly owned by Bayer CropScience Holding, SA, which is wholly owned by Bayer CropScience AG, which is also wholly owned by Bayer AG.

Respondent BASF Corporation: Respondent BASF Corporation is a wholly owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly owned subsidiary of BASFIN Corporation. BASF Corporation, BASF Americas Corporation, and BASFIN Corporation are all Delaware corporations. BASFIN Corporation is a majority owned subsidiary of BASF Nederland BV, a Dutch limited liability company, which in turn is a wholly owned subsidiary of BASF SE (Societas Europaea – "SE"), a publicly traded European Company. BASF Corporation, BASF Americas Corporation, BASFIN Corporation and BASF Nederland BV are not publicly held.

BASF SE is the successor to BASF Aktiengesellschaft. The transformation of BASF

Aktiengesellschaft into a European Company (Societas Europaea, SE), was officially completed on January 14, 2008 with the entry of the name in the commercial register of the Ludwigshafen district court, which thus rendered the company's name BASF SE.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

RESPONDENTS' BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S CONTROLLING PRECEDENTS 4

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS TO BE ADDRESSED 6

III. PETITIONERS' PENDING CHALLENGE TO THE FINALITY OF THE DISTRICT COURT'S UNDERLYING JUDGMENT ALSO COUNSELS AGAINST A GRANT OF CERTIORARI 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 4

Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005) 7

Hardwick v. Nu-Way Oil Co., Inc., 589 F.2d 806 (5th Cir. 1979) 7

Illinois Corp. Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) 7

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) 5

Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339 (9th Cir. 1983) 7

Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986) 7

Ozark Heartland Elecs. Inc. v. Radio Shack, 278 F.3d 759 (8th Cir. 2002) 7

Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964) 2, 4

Toledo Mack Sales v. Mack Trucks, 530 F.3d 204 (3d Cir. 2008) 6

United States v. General Electric Co., 272 U.S. 476 (1926) 2, 4

FEDERAL STATUTES

15 U.S.C. § 1 4

15 U.S.C. § 15(a) 4

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Bayer Corporation and Bayer CropScience, L.P. (collectively "Bayer") and BASF Corporation ("BASF") hereby respond in opposition to the Petition for a Writ of Certiorari filed by Petitioners on June 22, 2009. In the decision below, the United States Court of Appeals for the Fourth Circuit applied the well-established law on agency and consignment arrangements under Section 1 of the Sherman Act in a manner consistent with the controlling precedents of the Court and consistent with the decisions of other circuits. There is no issue that justifies granting a Writ of Certiorari.

STATEMENT OF THE CASE

1. Respondents adopt the statement of facts set forth in the Fourth Circuit's opinion below, (Pet. App. 4-7), but briefly summarize the relevant background.

In 1996, Bayer introduced Premise, an advanced non-repellent termiticide. (Pet. App. 4). Initially, Bayer sold its products to distributors, including Univar USA, Inc., one of the largest distributors of termiticides to pest management professionals (PMPs). (*Id.*). In 2000, Aventis CropScience, L.P. introduced Termidor, a competing non-repellent termiticide. (*Id.*). Soon after introducing Termidor, Aventis began distributing its product pursuant to non-exclusive agency agreements. (Pet. App. 4-5). Under those agreements, Aventis retained title until the product was sold to PMPs, set the retail price at which it would sell its product, and paid commissions to the selling agents (Pet. App. 5). Several distributors preferred the agency relationship due to its profitability, and expressed unhappiness with Bayer's distribution arrangement. (*Id.*). Fearing the

lost sales that would result if distributors chose to encourage Termidor sales over Premise sales, Bayer switched to a similar agency distribution model in January 2001. (*Id.*).

In October 2001, Bayer announced a plan to purchase all shares of Aventis. (Pet. App. 6). The FTC permitted the acquisition, but required Bayer to divest assets related to Termidor's active ingredient. (*Id.*). BASF acquired those assets in March 2003 and since that time has manufactured and sold Termidor in the United States. (*Id.*). Bayer ceased selling Premise via agency agreements in 2005, while BASF continues to sell Termidor pursuant to that model today. (*Id.*).

On April 25, 2005, Valuepest filed a putative class action lawsuit in the Western District of North Carolina, alleging that the agency relationships between Bayer and BASF, and their respective distributor agents, constituted vertical price fixing under Section 1 of the Sherman Act. (*Id.*). The parties agreed that the vertical price fixing claims would be resolved with respect to Univar, and that the resolution of the Univar claim would "set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors." (Pet. App. 6 & n.1). The District Court found that Bayer's and BASF's respective agency relationships were genuine, and that Bayer and BASF therefore could not be held liable for vertical price fixing under Section 1. (Pet. App. 7, 35-36, 49-50) (citing *United States v. General Electric Co.*, 272 U.S. 476 (1926), and *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964).) The District

Court thus entered summary judgment as to all claims. (Pet. App. 52)

On March 24, 2009, the Fourth Circuit affirmed. (Pet. App. 3). The court of appeals found "unconvincing [Petitioners'] various arguments that the agency agreements at issue in this case were shams," and held that, "[b]ecause the agency relationships between defendants and Univar were genuine, neither defendant violated § 1 [of the Sherman Act]." (Pet. App. 24.)

2. In their Petition for Certiorari, Petitioners assert that they have "established" certain points related to market definition, market share, and the weight of pro-competitive versus anti-competitive effects – matters that would be relevant to an antitrust rule of reason analysis – as well as an alleged overcharge. (Pet. 4-5.) Petitioners' assertions are simply not correct. Because the District Court found the agency relationships to be genuine and granted summary judgment in favor of Bayer and BASF on that basis, which the Fourth Circuit affirmed, the courts below have not addressed any of these points. When this action was pending in the District Court, Petitioners' expert did not offer an opinion on any rule of reason points that Petitioners now contend were established. Moreover, even though Plaintiffs did not place the question at issue, there was evidence that the agency relationships here had pro-competitive effects, including expert reports, indicating that prices went *down* for a great majority of consumers once the agency relationships were formed. Thus, the points that Petitioners claim are "established" in fact are disputed by Bayer and

BASF, and those issues have never been ruled on by any court.

3. Simultaneously with seeking a Writ of Certiorari, Petitioners have continued to litigate this case below. After the Fourth Circuit's decision affirming the judgment in favor of Bayer and BASF, Petitioners filed a motion in the District Court seeking relief from the judgment pursuant to Federal Rule Civil Procedure 60. The District Court denied that motion, and Petitioners have appealed that denial. Petitioners' second appeal of this matter to the Fourth Circuit remains pending at this time.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THIS COURT'S CONTROLLING PRECEDENTS

To prevail on a cause of action for a violation of Section 1 of the Sherman Act, a plaintiff must prove a "contract, combination . . . or conspiracy" that constitutes an unreasonable restraint of trade. 15 U.S.C. § 1. A private plaintiff must additionally prove antitrust injury. 15 U.S.C. § 15(a).

This Court held in *United States v. General Electric Co.*, 272 U.S. 476 (1926), and reaffirmed in *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964), that a genuine agency or consignment relationship defeats the "contract, combination . . . or conspiracy" element of the Sherman Act Section 1 claim. A principal and its agent cannot conspire for antitrust purposes, just as an employer and its employee cannot so conspire, and as a parent corporation and its subsidiary cannot so conspire. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court addressed the different question of whether a *per se* or rule of reason analysis applies to minimum resale price maintenance claims properly asserted under Section 1 of the Sherman Act. *Leegin* requires a plaintiff who asserts a minimum resale price maintenance claim to meet the more burdensome rule of reason standard in order to satisfy the restraint of trade element. *Leegin* did not address, and did not affect, the law on the "contract, combination . . . or conspiracy" element; indeed, it did not even mention this Court's prior decision in *General Electric*, let alone overrule or modify it.

Contrary to Petitioners' argument, there is no conflict between *General Electric* and *Leegin*. As the Fourth Circuit correctly explained, "*General Electric* addressed what types of relationships constitute agreements to set prices for purposes of the Sherman Act, while *Leegin* concerned whether such agreements, once proven, should be considered per se unlawful or evaluated for their reasonableness. The structure of § 1 of the Sherman Act makes the different focus of the two decisions clear." (Pet. App. 7-8.)

Bayer and BASF moved for summary judgment on the basis that their respective agency relationships were genuine, defeating the "contract, combination . . . or conspiracy" element as a matter of law. Because the District Court found the agency relationships to be genuine and granted summary judgment in favor of Bayer and BASF on that basis, which the Fourth Circuit affirmed, the lower courts had no reason to "apply *Leegin*" (Pet. 8) in any

respect. The Fourth Circuit's decision is entirely consistent with this Court's controlling precedent in *General Electric*.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS TO BE ADDRESSED

Petitioners also contend that the Fourth Circuit's decision below conflicts with the Third Circuit's decision in *Toledo Mack Sales v. Mack Trucks*, 530 F.3d 204, 224 (3d Cir. 2008). There is no conflict, because *Mack Trucks* did not involve an agency or consignment arrangement within the purview of *General Electric*.

The issue before the Third Circuit in *Mack Trucks* was whether the plaintiff had presented sufficient evidence of a territory allocation agreement between a truck manufacturer and its dealers and a separate agreement among the dealers themselves to avoid a directed verdict on the plaintiff's Sherman Act Section 1 claim. *Mack Trucks*, 530 F.3d at 218-24. Indeed, the Third Circuit carefully distinguished the two distinct "requirements" that must be established in an antitrust case: (1) showing an agreement (*i.e.*, the issue in the instant matter); and (2) establishing that the agreement "imposed an unreasonable restraint on trade" (*i.e.*, the issue raised in *Leegin*.) *See* 530 F.3d at 218. As precedent dictates, the Third Circuit addressed *Leegin* only *after* it found the plaintiffs' evidence was sufficient to allow a jury to find that the "combination, contract . . . or conspiracy" element was satisfied.

The Third Circuit's application of *Leegin* in *Mack Trucks* thus has no bearing on this case. *Mack Trucks* does not address Petitioners' argument here—*i.e.*, whether *Leegin* modified this Court's case law for

determining whether the agency relationships are genuine such that there is no "contract, combination . . . or conspiracy" as a matter of law. The Fourth Circuit's decision below is consistent with the decisions of other circuits that have addressed the genuineness of agency and consignment relationships. *See Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005); *Ozark Heartland Elecs. Inc. v. Radio Shack*, 278 F.3d 759 (8th Cir. 2002); *Illinois Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir. 1983); *Hardwick v. Nu-Way Oil Co., Inc.*, 589 F.2d 806 (5th Cir. 1979). Thus, there is no conflict among the circuits for the Court to address.

III. PETITIONERS' PENDING CHALLENGE TO THE FINALITY OF THE DISTRICT COURT'S UNDERLYING JUDGMENT ALSO COUNSELS AGAINST A GRANT OF CERTIORARI

Apart from Petitioners' inability to identify either a legal error in the Fourth Circuit's decision, or a circuit split on the question presented, certiorari should also be denied due to the Plaintiffs ongoing attempt to reopen, via Federal Rule of Civil Procedure 60, the very judgment for which it currently seeks certiorari review.

During the District Court proceedings, the parties recognized that Bayer's and BASF's agency relationships with all of their distributors involved common issues of law and fact, and the "parties recognized the desirability of taking one contract at issue (Univar) and determining whether or not it was an unlawful restraint of trade or a lawful agency

relationship." (App. 3a). The District Court concluded that the Univar relationships were lawful agency relationships and granted summary judgment as to all claims. (*Id.*).

The matter was appealed to the Fourth Circuit as a final judgment (not as an interlocutory appeal). *Id.* After briefing and argument in the Fourth Circuit, and days before the Fourth Circuit ultimately issued its decision, Petitioners asked the Fourth Circuit to stay the proceedings and remand for a "clarification" of the scope of the summary judgment order. (App. 5a). The Fourth Circuit declined to stay its proceedings, and affirmed the dismissal of Petitioners' claims in their entirety. *Id.*

Thereafter, Petitioners sought to reopen the judgment in the District Court pursuant to Rule 60. The motion to reopen was denied. (App. 5a). On June 10, 2009, Petitioners appealed to the Fourth Circuit. (App. 7a-8a). The case currently remains pending in the Fourth Circuit, as Fourth Circuit Docket No. 09-1663.

As this procedural history illustrates, Petitioners now find themselves in the unusual position of seeking Supreme Court review of a final judgment while simultaneously attacking the finality and scope of that judgment in the Fourth Circuit. This unusual procedural posture further counsels against certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS W. EY, JR.
CATHERINE E. THOMPSON
JASON D. EVANS
McGUIREWOODS LLP
100 North Tryon Street
Suite 2900
Charlotte, NC 28202
(704) 343-2076

GLEN D. NAGER
(*Counsel of Record*)
PHILLIP A. PROGER
LAWRENCE D. ROSENBERG
L. TRAMMELL NEWTON, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents

July 27, 2009

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:05CV90

VALUEPEST.COM OF CHARLOTTE, INC., f/k/a Budget Pest Prevention, Inc.; NATIONAL PEST CONTROL, INC.; and PEST PROS, INC., individually and on behalf of persons similarly situated,	)	
Plaintiffs,	)	Order
VS.	)	
BAYER CORPORATION; BAYER CROPSCIENCE, L.P.; and BASF CORPORATION,	)	
Defendants.	)	

THIS MATTER is before the Court on Plaintiffs' amended motion to correct Judgment pursuant to

Fed. R. Civ. P. 60(a) and for relief from Judgment pursuant to Fed. R. Civ. P. 60(b)(6) and their request for oral argument thereon. Defendants oppose the relief sought and have moved the Court for leave to file a joint surreply. Because the Court finds that oral argument or the benefit of a surreply from Defendants would not aid the decisional process, the parties' respective motions are denied. For the reasons set forth below, the motion to correct and for relief from Judgment is likewise denied.

On April 25, 2005, Plaintiffs filed this action alleging Defendants violated the Sherman Act, 15 U.S.C. § 1, by engaging in a form of vertical price fixing with their numerous distributors regarding the sale of chemical products used to kill termites. ***See*** **Complaint, filed April 25, 2005; Memorandum and Order, filed July 13, 2007, at 2.** The Plaintiffs amended the original complaint on four separate occasions, but the basic claim for relief remained essentially the same. ***See*** **First Amended Complaint, filed July 29, 2005; Second Amended Complaint, filed October 13, 2005; Third Amended Complaint, filed March 17, 2006; Fourth Amended Complaint, filed November 17, 2006.** The complaints recognized that several thousand party plaintiffs could be involved and that "[t]he questions of law and fact common to the members of the class predominate over any questions affecting individual members[.]" **Fourth Amended Complaint, ¶ 13.** On November 21, 2006, Plaintiffs filed their motion for class certification. This motion was addressed by the Court in its Memorandum and Order granting summary judgment:

> Because the Defendants' motions for summary judgment will be granted, Plaintiffs' motion for class certification is now moot and will not be addressed.

Memorandum and Order, supra, at 2, n.1.

From the beginning of the case, it was clear to this Court that the parties recognized the desirability of taking one contract at issue (Univar), and determining whether or not it was an unlawful restraint of trade or a lawful agency agreement thereby disposing of the first major issue in the case by that determination. As noted above, Plaintiffs alleged that while thousands of claims could be involved, the questions of law and fact were common to the members of the class and the challenged agreements similar. At no time prior to the entry of its Memorandum and Order and Judgment on July 13, 2007, was this Court aware that Plaintiffs considered any ruling on the summary judgment motions to be only a partial or piecemeal disposition of the case. To allow Plaintiffs to now contend that they never intended this Court's Judgment to be a final determination of all the issues in the case "would lead to the untenable result that 'a party who has chosen not to argue a point on first appeal should stand better as regards the law of the case than one who argued and lost.'" ***Engle Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999) (quoting *Fogle v. Chstnutt*, 668 F.2d 100, 109 (2d Cir. 1981)).**

The Court's Memorandum and Order noted:

> Although Plaintiffs allege Defendants have engaged in price fixing with a vast number of their Premise or Termidor distributors, the parties have

> stipulated to first resolve Plaintiffs' allegations regarding Defendants' individual relationships with the common distributor Univar. It is the parties' intention that the resolution of Plaintiffs' claims against Defendants as to their relationships with Univar will set the framework for resolution of Plaintiffs' claims against Defendants with regard to all of their individual distributors.

Memorandum and Order, *supra*, at 2-3 (citing Certification of Initial Attorney Conference, filed September 8, 2005, at 2). Additionally, the Court's Judgment was perfectly clear:

> [T]he motions of Defendants Bayer Corporation/Bayer Cropscience, L.P., and Defendant BASF Corporation for summary judgment are **ALLOWED**, and this matter is hereby **DISMISSED WITH PREJUDICE** in its entirety.

Judgment, filed July 13, 2007, at 1-2 (emphasis in original). In affirming this Court, the Fourth Circuit stated that "[b]ecause the agency *contracts* are legitimate business arrangements, and not unreasonable restraints on trade creating potential § 1 liability, the judgment is affirmed."

***Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 294 (4th Cir. 2009) (emphasis added).**

It appears Plaintiffs failed to raise or address any issue as to the scope of the Judgment in their briefs or at oral argument before the appellate court. This clearly could have been done. Having failed to do so, this Court concludes the issue has been abandoned. ***See* Fed. R. App. P. 28(a)(9)(A); *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir.) ("We have generally held that 'a party's failure to raise or discuss an issue**

in his brief is to be deemed an abandonment of that issue.'" (quoting *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740 (8th Cir. 1985)).

Additionally, only seven days before the Circuit issued its opinion in this case, Plaintiffs sought a stay of further proceedings and a remand for clarification of this Court's Judgment. The Fourth Circuit denied the Plaintiffs' motions in a one sentence order filed March 18, 2009. On April 15, 2009, the Fourth Circuit issued its mandate finalizing its Judgment of March 24, 2009.

> The force of our [mandate] is governed by well-established principles. In general, once a case has been decided on appeal and a mandate issued, the lower court may not deviate from that mandate but is required to give full effect to its execution. . . . Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when "controlling legal authority has changed dramatically"; (2) when "significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light"; and (3) when "a blatant error in the prior decision will, if uncorrected, result in a serious injustice."

***Intervention Submission Corp. v. Dudas*, 413 F.3d 411, 414-15 (4th Cir. 2005) (quoting *United States v. Aramony*, 166 F.3d 655, 662 (4th Cir. 1999)) (other citations omitted).** Plaintiffs here make no forecast of evidence that any of the Defendants' relationships with any other distributor differs from that with Univar. Had there been this contention, then class certification, as sought by the Plaintiffs, would not have been available.

IT IS, THEREFORE, ORDERED that the Plaintiffs' amended motion to correct Judgment and for relief from Judgment and their request for oral argument thereon are **DENIED.**

IT IS FURTHER ORDERED that Plaintiffs' amended motion for an order invoking report of initial attorneys' conference and pretrial order is **DENIED** as moot.

IT IS FURTHER ORDERED that the Defendants' motion for leave to file a joint surreply is **DENIED.**

Signed: May 19, 2009

/s/ Lacy H. Thornburg
Lacy H. Thornburg
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

VALUEPEST.COM OF CHARLOTTE, INC., f/k/a Budget Pest Prevention, Inc.; NATIONAL PEST CONTROL, INC.; and PEST PROS, INC., individually and on behalf of persons similarly situated,	)	CIVIL NO. 1:05CV90
Plaintiffs,	)	
VS.	)	
BAYER CORPORATION; BAYER CROPSCIENCE, L.P.; and BASF CORPORATION,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that ValuePest.com of Charlotte, Inc., f/k/a/Budget Pest Prevention Inc., National Pest Control, Inc. and Pest Pros, Inc., individually and on behalf of persons similarly situated, hereby appeal to the United States Court of

Appeals for the Fourth Circuit from the Order denying the Plaintiffs' Motions for Relief from Judgment under Rule 60(a) .nd Rule 60 (b) entered in this action on the 20th day of May, 2009.

This the 10th day of June, 2009.

WEAVER, BENNETT &
BLAND, P.A.
196 North Trade Street
P.O. Box 2570
Matthews, NC 28106
(704) 844-1400

By: /s/ Michael David
Bland
Michael David Bland
N.C. Bar No. 008179
S.C. Bar No. 000728

SIGMON, CLARK,
MACKIE, HUTTON,
HANVEY AND
FERRELL, P.A.
420-B Third Avenue NW
P.O. Drawer 1470
Hickory, NC 28603
Phone: 828.328.2596
Fax: 828.328.6826
Email: warren.hutton@
sigmonclark.com
Email: forrest.ferrell@
sigmonclark.com.

By: /s/ Forrest Ferrell
Forrest A. Ferrell
N.C. Bar No. 1439

/s/ Warren Hutton
Warren A. Hutton
N.C. Bar No. 109399

[Certificate of Service Omitted]